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M. Kenneth White v. Salt Lake City : Brief of Appellant

Utah Supreme Court

William D. Callister; A. C. Melville; Attorneys for Appellant;

7652

In the Supreme Court of the State of Utah

M. KENNETH WHITE,

Plaintiff and Appellant,

vs.

SALT LAKE CITY, a Municipal Corporation,

Defendant and Respondent.

Case No. 7652

BRIEF OF APPELLANT

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pality. That Plaintiff's ownership of said abutting property includes the streets themselves, subject only to the use thereof by the public for highway purposes. The abutting property had been subdivided into building lots.

The Defendant municipal corporation, without obtaining the consent of Plaintiff, laid and constructed a 48-inch steel-reinforced concrete water pipe line along and under the surface of said streets, for the purpose of conducting water to Salt Lake City, for the domestic and industrial users in said City; that the property abutting said streets was in no way served or benefitted by the said water pipe line.

Plaintiff then alleged consequential damages resulting from Defendant's unlawful appropriation of, and trespass upon Plaintiff's property, followed by a prayer for a decree requiring Defendant to remove said line, to enjoin Defendant from laying any line through said street, and for damages and costs. (R. pp. 1, 2.)

Defendant's motion to dismiss upon the grounds the complaint failed to state a cause of action was granted. (R. pp. 5, 6.)

Plaintiff then filed an amended complaint with substantially the same allegations as contained in the original complaint, as set out above; there was added, however, allegations that Plaintiff, because said water pipe line was laid in said streets, would be required to lay duplicate water and sewer lines to serve said property, and that duplicate gas lines would also be required, and that as a further result of said water pipe line, the development of said property as a residential sub-

division would be materially retarded. The prayer for damages was the same as contained in the original complaint. (R. pp. 7, 8).

Defendant's motion to dismiss the amended complaint for the same reason as for the dismissal of the original complaint was granted (R. p. 11). From this judgment of dismissal, Plaintiff appeals.

The sole question to be determined in this appeal, is whether Plaintiff, either in the original or in the amended complant, has stated a cause of action upon which relief should be granted.

STATEMENT OF POINTS

POINT I

Ownership of property abutting both sides of a street includes ownership of the street itself, subject only to the use of the same by the public for highway purposes.

POINT II

The unauthorized laying of a water pipe line by a municipality in a street outside of its corporate limits, which line in no way benefits or serves the abutting property, is an additional burden upon the property, constituting an invasion of the abutting owner's rights, and is actionable.

ARGUMENT

POINT I

OWNERSHIP OF PROPERTY ABUTTING BOTH SIDES OF A STREET INCLUDES OWNERSHIP OF THE STREET ITSELF, SUBJECT ONLY TO THE USE OF THE SAME BY THE PUBLIC FOR HIGHWAY PURPOSES.

Appellant, in the original and amended complaints, alleged ownership of property abutting both sides of the streets in question, and a property interest in the street itself. Appellant contends that this interest is the ownership of the fee, subject to the public's use thereof for highway purposes. Our statutes, and cases decided thereunder, are very clear on these points.

Section 36-1-1, Utah Code Annotated 1943, reads as follows:

> "In all counties all roads, streets, alleys, lanes, courts, places, trails and bridges laid out or erected as such by the public, or dedicated or abandoned to the public, or made such in actions for the partition of real property, are public highways."

In Section 36-1-7, Utah Code Annotated 1943, we find the following:

> "By taking or accepting land for a highway the public acquires only the right of way and incidents necessary to enjoying and maintaining it. A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the middle of the highway."

It is clear from these two sections of the Statutes, that the streets in question are categorically classified as "highways," and that the Plaintiff, in owning the abutting property, owns to the center of the highway, subject only to the right of the public in the same as a right of way.

The Respondent relied upon Section 78-5-4, Utah Code Annotated 1943, contending that the County of Salt Lake owned the streets in question, and it was upon this statute that the District Court granted the order of dismissal of the original complaint.

Section 78-5-4 has the following provisions:

> "Such maps and plats, when made, acknowledged, filed and recorded, shall operate as a dedication of all such streets, alleys and other public places, and shall vest the fee of such parcels of land as are therein expressed, named or intended for public uses in such county, city or town for the public for the uses therein named or intended."

However, Sowadzki vs. Salt Lake County, 104 Pac. 111, at page 116, construed Chapter 50, Laws of 1890, page 76, which is the forerunner of Section 78-5-4 quoted above, and which is substantially the same in wording, and identical in meaning. In the Sowadzki case, our Supreme Court said:

> "While the word 'fee' is used in the section, it is clear from what follows that it was not intended that the fee of the corpus or land itself should pass, but only the fee to the surface, and this only for public use for all purposes of a street or highway. The fee mentioned in the statute was thus what is known as

a limited or determinable fee, and was created for a special purpose or purposes only, and hence was subject of abandonment."

Thus, from the foregoing Sections of our code and the Sowadzki case, it must be concluded that neither the public nor the County of Salt Lake owned the fee interest in the corpus of the streets described in the complaint. The fee title belongs to the abutting owner. In fact, the County owns nothing. Only a right of use exists in the public for highway purposes. Consequently, the Appellant in the instant case has a property interest in the street which is subject to an invasion or damage.

POINT II

THE UNAUTHORIZED LAYING OF A WATER PIPE LINE BY A MUNICIPALITY IN A STREET OUTSIDE OF ITS CORPORATE LIMITS, WHICH LINE IN NO WAY BENEFITS OR SERVES THE ABUTTING PROPERTY, IS AN ADDITIONAL BURDEN UPON THE PROPERTY, CONSTITUTING AN INVASION OF THE ABUTTING OWNER'S RIGHTS, AND IS ACTIONABLE.

We are next concerned with whether there is alleged an invasion of Appellant's property interest in the street, which is actionable.

In the original and amended complaints, Appellant alleged that the unauthorized laying of the water pipe line in the street was a trespass. In the amended complaint, there

was an allegation also that the use of the street by the Respondent in such a way as to interfere with the normal use thereof by Appellant in servicing his own property, was an invasion of Appellant's property rights in and to the street.

Tiffany on Real Property, 3rd Edition, Vol. 3, paragraph 926, under the subject of Additional Servitudes, at pages 603-04 has this to say:

> " . . . The use of a street or highway for sewers, gas pipes, or water pipes, is a legitimate use, for which the owner of the fee cannot recover compensation, *unless it is not for the benefit of the community itself, or the members thereof, but is for the benefit of another municipality, or of individuals alone . . .* " (Italics ours.)

This principle as contained in Tiffany, which appears to be universal, is supported by many cases. Some of them refer to the laying of gas mains; others, sewers; and still others, water mains, such as concern us in the instant case.

The court was concerned with the laying of a gas line in a county highway, outside the municipality thereby served, in Sterling's Appeal, 2 Atl. 105, a Pennsylvania case. The court said:

> "In Bloomfield and Rochester Natural Gas-Light Co. vs. Calkins, 62 N.Y. 386, it was held that a corporation organized under an act similar to ours, authorizing formation of gas-light companies, has no authority to lay its pipes in a country highway without the consent of, or without the appraisal and payment of compensation to, the owner of the land. There is no reason why this should not be the rule with respect to public roads in the rural districts."

In Kincaid vs. Indianapolis Natural Gas Co. (Indiana), 24 N. E. 1066, the Gas Company laid mains in a highway outside of the municipality to be served. The court said:

> " . . . The appropriation of the land for a rural highway did not entitle the local officers to use it for any other highway purposes, although they did acquire a right to use it for all purposes legitimately connected with the local system of highways. A use for any other than a legitimate highway purpose is a taking within the meaning of the Constitution, inasmuch as it imposes an additional burden upon the land, and whenever land is subjected to an additional burden the owner is entitled to compensation. The authorities, althought not very numerous, are harmonious upon the question that laying gas-pipes in a suburban road is the imposition of an additional burden, and that compensation must be made . . . "

Several cases are cited in this case in support of the legal principle.

The Ward vs. Triple State Natural Gas & Oil Co. case, 74 S. W. 709, decided by the Kentucky Supreme Court, presented a similar situation. The Kentucky Supreme Court handed down the same ruling as the Kincaid case, citing it as an authority for so doing.

The problem of a municipality laying a line (this time a sewer line) in a street outside the corporate limits of the city thereby served, was involved in the case of Van Brunt, et. al., vs. Town of Flatbush, et. al., 27 N. E. 973, a New York case.

In this case, the Town of Flatbush constructed a sewer

line to discharge sewer into the ocean, and in so doing, laid the line over and through a street in a sparsely-populated section of Flatlands, another community. Inasmuch as there was only an easement over the street in the public, the court held that the Town of Flatbush must condemn and pay for the land, saying:

> "The sewer belongs exclusively to the Town of Flatbush, and is solely for the benefit of the inhabitants thereof. Under such circumstances, what right have the commissioners to enter upon the lands of the Plaintiffs and dig up their soil and place sewers therein without their consent and without compensation to them? We can perceive none, and we know of no principle of law and of no authority which can justify them . . . "

In the case at bar, the City of Salt Lake is attempting to use the land of the Plaintiff to lay a water pipe line, in which the public only has an easement for highway purposes, which line is "solely for the benefit of the inhabitants" of Salt Lake City. Applying the principle of the foregoing case, this cannot be done without securing the consent of, and compensating the Plaintiff.

One of the questions which came up in Rouse vs. Kinston, 123 S. E. 482, a North Carolina case, was whether an abutting owner to a highway outside the limits of a municipality, was entitled to compensation for the laying of a water main under the surface of the highway by the municipality. The court, stating that the abutting owner held the fee interest, on page 486, had this to say:

> "In the present case, the defendant denies the right of Plaintiff to recover damages for the pipe line run-

ning along the state highway No. 10, plaintiff having a fee simple title to the land. In Teeter v. Postal Teleg.-Cable Co., 172 N. C. 785, 90 S. E. 941, it is said: 'It is not denied by defendant that the telegraph line superimposed upon a railroad right of way is an additional burden which entitled the owner to compensation. Hodges v. Western U. Teleg. Co., 133 N. C. 225, 45 S. E. 572; Phillips v. Postal Teleg.-Cable Co., 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022'.

"To the same effect is a water main."

In Hofius vs. Carnegie-Illinois Steel Corp., (1946) 146 Ohio St. 574, 67 NE (2) 429, we have a case which is identical with the one at bar. In the Hofius case, there was an attempt to construct a water main in a highway outside a municipality by a village for the benefit of domestic and industrial users of the village.

The court held that the public's interest in a highway outside the municipality is an easement for the purpose of public travel, with the fee remaining in the abutting landowner. Then the court had this to say in the syllabus, which was borne out in the opinion itself:

> "The construction of a water main in a highway outside a municipality by a village for the benefit of domestic and industrial water users of the village constitutes an additional burden upon the fee of the abutting owner."

Numerous cases are cited in the Hofius case in support of the doctrine therein accepted.

Counsel for Appellant has checked each of the foregoing cases in Shepard's Citator, and not one of them has been overruled or modified by a later decision.

CONCLUSION

In view of the foregoing, there can be but one conclusion. The Plaintiff, having alleged in his complaint that he, as the abutting owner, is the owner of the fee of the streets in question, subject only to the right of way in the public for highway purposes, and the laying of the water pipe line therein by Salt Lake City, the Respondent, without first having obtained the consent of the Plaintiff owner, has set forth, both in the original and amended complaints, a cause of action.

Thus, Appellant urges this Honorable court to reverse the judgment of the trial court dismissing the original and amended complaints, with instructions to the trial court to require Respondent to file its answer thereto, and to proceed to hear the matter on its merits.

Respectfully submitted,

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